TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 98.

SAMUEL MONROE AND DAVID M. RICHARDSON, LATE COPARTNERS TRADING AS MONROE AND RICHARDSON, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 29, 1900.

(17,819.)

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INDEX

	Original	Print.
Petition	1	1
Articles of agreement between Captain W. L. Marshall and Monroe & Richardson, July 19, 1892	6	4
Motion to dismiss	13	8
Order allowing motion in part	13	8
Findings of fact	14	8
Conclusion of law	17	12
Opinion	17	12
Judgment	20	15
Application for and allowance of appeal	21	15
Clerk's certificate	22	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1901.

1 Court of Claims.

SAMUEL MONROE and DAVID M. RICHARDSON, Late Co-partners Trading as Monroe and Richardson,
vs.
THE UNITED STATES. } No. 20003.

I.—*Original Petition. Filed April* 29, 1896.

To the Chief Justice and Judges of the Court of Claims:

The petition of Samuel Monroe and David M. Richardson, late copartners, trading as Monroe and Richardson, respectfully shows:

I.

That your petitioners are citizens of the United States, and of the State of Ohio.

II.

That on or about the 25th day of May, 1892, the United States, through W. L. Marshall, a captain in its corps of engineers,
2 put out an advertisement inviting proposals for constructing a canal, to be known as the Illinois and Mississippi canal, upon certain terms, conditions, and specifications, all of which are fully and at large set forth in Exhibit B, hereto attached and made part of this petition.

III.

That in response to the said advertisement, and in strict accordance with all its requirements, your petitioners submitted a bid or proposal to do certain parts of the said work, which proposal was duly accepted by the United States, and your petitioners were so notified in writing by the said Captain W. L. Marshall, corps of engineers, on the 19th day of July, 1892.

IV.

That on the 20th day of July, 1892, the said Captain W. L. Marshall forwarded a formal contract and bonds to be executed within ten days thereafter, which your petitioners fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by said Captain Marshall, the said contract and its form having been previously authorized by the Chief of Engineers of the United States.

V.

That immediately upon the award of the work to your petitioners and the acceptance of their bid your petitioners began active preparations for the commencement of the said work; that the work was of considerable magnitude and required the outlay of large sums of money in the preparation for its execution, and in pursuance thereof

your petitioners shipped from their home at Portsmouth,
3 Ohio, a car-load of tools to Rock Island, Illinois, rented and furnished a boat and had the same taken to Rock river, in the vicinity of the work, to be used as a boarding-house for men employed on the work, built stables for their teams, hired men and teams, purchased a large amount of plant consisting of shovels, plows, scrapers, and the like, and generally equipped themselves in a proper manner to expeditiously perform the work, and actually commenced the work with men and teams and prosecuted the same for three days.

VI.

That on the 6th day of August, 1892, without fault on their part and while the work was progressing to the satisfaction of the United States they were stopped by the United States and their contract abrogated, against their consent, by the United States, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract, binding the contractor not to permit his workmen to labor more than eight hours per day; and notwithstanding that their said contract was awarded on the 19th day of July, 1892, prior to the passage of the said law, the United States refused to permit your petitioners to continue the work either under the terms of the contract or under the terms of the said law of August 1, 1892, but immediately, and against the protest of your petitioners, readvertised the work and let the said work to other parties.

VII.

That by reason of the unlawful action of the United States in
4 the premises your petitioners were put to great cost, expense, loss of time and were deprived of the profits that they would have made in the execution of the work.

VIII.

That your petitioners had had great experience in the performance of work of like character and, with the equipment plant and facilities that they had and had provided, that they would have been able, if not prevented by the United States, to have performed the work at a cost of them of the following sums:

On the first mile:	
78,943 excavation, at $7\frac{3}{4}$	$6,118 08
On the second mile:	
49,692 excavation at $10\frac{1}{4}$	5,093 43
On the third mile:	
27,665 excavation, at $8\frac{3}{4}$	2,420 68

Lock 36:	
1,000 cubic yards sand, 20 cts	200 00
2,500 cubic yards pebbles, 25 cts	625 00
9,074 cubic yards earth, 12 cts	1,088 88
Guard-lock:	
1,500 cubic yards sand, 25 cts	375 00
3,500 cubic yards pebbles, 25 cts	875 00
Timber:	
564 piles, at $2.50	1,128 00
55,000 feet, at $18.00	990 00
15,000 feet pine, at $18.00	270 00
9,600 feet oak, at $18.00	172 80
5,000 lbs. iron bolts, at 1¾ cts	87 50
420 lbs. carriage bolts, at 3½ cts	14 70
1,500 lbs. spikes, at 2½ cts	37 50
1,050 cubic yards concrete, at $2.50	2,625 00
Making an aggregate total cost of	$22,121 57

5 and that, at the contract price, your petitioners would have been entitled to have received for said work the sum of $47,607.46, leaving a net profit to your petitioners of the sum of $25,485.89, of which they were deprived by reason of the unlawful abrogation of their said contract.

IX.

Wherefore your petitioners pray judgment against the United States for the sum of twenty-five thousand four hundred and eighty-five dollars and eighty-nine cents ($25,485 89) and costs.

DAVID M. RICHARDSON.
SAMUEL MONROE.

JNO. C. FAY,
Attorney for Claimants.

STATE OF OHIO, }
County of Scioto, } *ss:*

On this sixteenth day of April, 1896, personally appeared David M. Richardson, one of the above-named claimants, who being duly sworn, on oath says that he has heard read the foregoing petition and knows the contents thereof; that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true; that no assignment of the claim has been made.

DAVID M. RICHARDSON.

Subscribed and sworn to before me the day and year aforesaid.

[SEAL.]

CHAS. E. MOLSTER,
Notary Public within & for the County of Scioto & State of Ohio.

6 Articles of agreement entered into this 19th day of July, eighteen hundred and ninety-two (1892), between Captain W. L. Marshall, corps of engineers, U. S. Army, of the first part, and Samuel Monroe and David M. Richardson, partners, doing business under the firm name of Monroe and Richardson, of Portsmouth, of the county of Scioto, State of Ohio, of the second part.

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Captain W. L. Marshall, corps of engineers, for and in behalf of the United States of America, and the said Monroe and Richardson for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

That the said Monroe and Richardson, parties of the second part, in consideration of payments to be made as hereinafter provided, shall furnish all labor, material, and appliances, and shall perform the following work described in the specifications hereunto attached:

Shall construct three miles or less of the trunk of the Illinois and Mississippi canal, involving the following amounts, more or less, of earthwork, in excavation and embankment.

	Excavation. Cubic yards.	Embankment. Cubic yards.
1st mile	78,943	72,340
2d mile	49,691	46,786
3d mile	27,665	31,960

Shall screen, wash if necessary, sort and deliver at the respective lock sites, the following quantities, more or less, of sand and pebbles:

7

	Sand. Cubic yards.	Pebbles. Cubic yards.
At lock 36	1,000	2,500
At guard-lock	1,500	3,500

Shall excavate at the site of lock 36, Illinois and Mississippi canal, nine thousand and seventy-four (9,074), more or less, cubic yards of earth.

Shall prepare the lock foundations at lock 36, Illinois and Mississippi canal, and furnish and place in the work, the following quantities, more or less, of materials:

Five hundred and sixty-four (564) piles, driven, placed, sawed off, and barked.

Fifty-five thousand (55,000) feet, board measure, of pine timber.

Fifteen thousand (15,000) feet, board measure, of pine plank.

Nine thousand six hundred (9,600) feet, board measure, of oak plank.

Five thousand (5,000) pounds, avoirdupois, iron drift bolts.

Four hundred and twenty (420) pounds, avoirdupois, carriage bolts, with nuts and washers.

Fifteen hundred (1,500) pounds, avoirdupois, spikes or nails.

One thousand and fifty (1,050) cubic yards of concrete, the cement to be furnished and delivered by the United States at Milan, Ill.

And the United States in consideration of the work having been duly done, and the sand and pebbles delivered and accepted in accordance with the specifications above referred to, shall make payments as hereinafter provided, to the said Monroe and Richardson, as follows:

8 For earthwork, excavation, and embankment.

1st mile, seven and three-fourths ($7\frac{3}{4}$) cents per c. y.
2d mile, ten and one-fourth ($10\frac{1}{4}$) cents per c. y.
3d mile, eight and three-fourths ($8\frac{3}{4}$) cents per cubic yard.
For sand, at lock 36, fifty (50) cents per cubic yard.
For pebbles, at lock 36, seventy-five (75) cents per cubic yard.
For sand, at guard-lock, forty (40) cents per cubic yard.
For pebbles, at guard-lock, seventy (70) cents per cubic yard.
For earth excavation, at lock 36, twenty-nine (29) cents per cubic yard.
For piles, in work, five dollars and fifty cents ($5.50) each pile.
For pine plank, in work, twenty-eight (28) dollars per 1,000 ft. B. M.
For pine timber, in work, twenty-nine (29) dollars per 1,000 ft. B. M.
For oak plank, in work, forty (40) dollars per 1,000 ft. B. M.
For iron drift bolts, in work, four (4) cents per pound avoirdupois.
For carriage bolts, in work, seven (7) cents per pound avoirdupois.
For spikes and nails, in work, five (5) cents per pound avoirdupois.
For concrete, in work, four dollars ($4.00) per cubic yard.

It is further agreed and understood between the parties hereto, that the party of the second part will screen, sort, and deliver to the party of the first part, sand and pebbles at the location of the gravel pits or deposits, in the quantities and at the prices proposed by them, viz:

9 Sand, at 15 cents per cubic yard,
Pebbles, for 25 cents per cubic yard,

sorted, screened, and delivered at the option of the party *party* of the first part, instead of at the lock sites as hereinbefore agreed upon, and that the party of the first part shall pay to the party of the second part the prices just named for such materials at the pits.

It is further understood and agreed that if the gravel or sand pits encountered in the excavation of canal trunk are of insufficient extent to supply the quantities stated herein, that the party of the second part shall not be required to screen, sort, and deliver the same at gravel pits or lock sites, beyond the amounts excavated from the canal trunk.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as — not conform to the specifications set forth in this contract shall be re-

jected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Monroe & Richardson shall commence work on or before the first day of August, eighteen hundred and ninety-two (1892), and shall complete the lock-pit excavation and foundation on or before the thirtieth day of September, eighteen hundred and ninety-two (1892), and the canal-trunk earthwork on or before November 15, 1892.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the
10 sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting
11 forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified

agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

12 Payments shall be made on monthly estimates to the said Monroe & Richardson, when the partial work contracted for shall have been delivered and accepted, reserving ten (10) per cent. from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said Monroe & Richardson to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said Monroe & Richardson are reserved to the United States.

No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

W. L. MARSHALL, [SEAL.]
Captain, Corps of Engineers.
SAMUEL MONROE. [SEAL.]
DAVID M. RICHARDSON. [SEAL.]

Witnesses:
S. F. PEGUES.
CHAS. E. MOLSTER.
W. H. WHITE.

13 II.—*Motion to Dismiss. Filed January 25, 1900.*

Come now the defendants, The United States by their Attorney General and move the court that the petition in the above-entitled cause be quashed and the case dismissed for the reasons—

1st. That the said petition fails to state facts sufficient to constitute a cause of action.

2nd. That this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect, as follows: "This contract shall be subject to the approval of the Chief of Engineers, U. S. A." Not only does the contract itself a copy of which is attached as above, fail to show that the same was ever approved by the Chief of Engineers U. S. A., but the testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever.

Wherefore, the defendants pray that the petition may be quashed and action be dismissed accordingly.

Respectfully submitted.

L. A. PRADT,
Ass't Att'y Gen'l.

Order.

Allowed in part and judgment for defendants on findings of fact filed.

BY THE COURT.

February 26, 1900.

14 III.—*Findings of Fact and Conclusion of Law. Filed February 26, 1900.*

This case having been heard by the Court of Claims, the court upon the evidence, make the following

Findings of Facts.

I.

The claimants are citizens of the United States and of the State of Ohio.

II.

On or about the 25th day of May, 1892, the United States, through W. L. Marshall, a captain in its corps of engineers, published the following advertisement inviting proposals for constructing a canal to be known as the Illinois and Mississippi canal:

"UNITED STATES ENGINEER OFFICE,
"ROOM 90, 134 VAN BUREN ST.,
"CHICAGO, ILL., *May 25th*, 1892.

"Sealed proposals in triplicate for constructing three miles or less of the trunk of the Illinois and Mississippi canal near the mouth of Rock river; for screening, sorting, and delivering sand and pebbles, and for excavating the lock pits, and constructing the foundations for three locks, will be received at this office until 12 noon, central time, Saturday, June 25th, 1892, and then opened. Bidders are invited to be present. Blank forms of proposals and specifications will be furnished on application. General plans of the works can be seen and other information can be had at the office of Assistant Engineer L. L. Wheeler, at Milan, Illinois.

"The attention of bidders is invited to acts of Congress approved February 26, 1885, and February 23, 1887, vol. 23, page 332, and vol. 24, page 414, Statutes at Large. Preference will be given to materials of domestic production, conditions of quality and price (including duties) being equal. The United States reserves the right to reject any or all bids.

"W. L. MARSHALL,
"*Captain, Corps of Engineers, U. S. A.*"

15 III.

In response to said advertisement claimants submitted a bid or proposal to do certain parts of said work, which was accepted by Captain Marshall, acting under the following authority from the Chief of Engineers United States Army.

"UNITED STATES ENGINEER OFFICE,
"1637 INDIANA AVE., P. O. DRAWER 132,
"CHICAGO, ILL., *June* 29, 1892.

"Brig. Gen. Thos. L. Casey, Chief of Engineers, U. S. A., Washington, D. C.

"GENERAL: I have the honor to forward herewith abstract of proposals, together with one copy of each proposal received, for constructing three miles or less of canal trunk, Illinois and Mississippi canal, with the following recommendations, viz:

"That bid of Messrs. Monroe & Richardson, of Portsmouth, Ohio, be accepted for the following works:

"Earthwork for 3 miles canal trunk.

"Sand and pebbles at lock 36.

"Sand and pebbles at guard-lock.

"Lock pit and foundation at lock 36.

"That the bid of Michael H. King, of Des Moines, Iowa, be accepted for—

"Lock pit and foundation at guard-lock.

"That bid of Andrew J. Whitney, of Rock Island, Ill., be accepted for—

"Lock pit and foundation of lock 37.

"Sand and pebbles at lock 37.

"The above recommendations are made provided none of the bidders named above appear at engineer department on list of failing contractors.

"Very respectfully, your obedient servant,

"W. L. MARSHALL,
"*Captain, Corps of Engineers.*"

(1st indorsement.)

"ENG'R DEPARTMENT, *July* 2, 1892.
"OFFICE CHIEF ENGINEERS, *July* 6, 1892.

"Respectfully returned to Captain Marshall, corps of engineers, who is authorized to accept the bid of Monroe & Richardson for the earthwork for the three miles canal trunk, for sand and pebble at guard-lock, and for lock-pit foundation at lock 36.

"The bid of Michael H. King, of Des Moines, Iowa, for lock pit and foundation at guard-lock, and the bid of Andrew J. Whitney, of Rock Island, Ill., for lock pit and foundation of lock 37 and for sand and pebble at lock 37, these bidders being the lowest for the several items.

"The Chief of Engineers desires to know what objection exists to awarding the contract for sand and pebbles at lock 36 to
16 Wilcoxon, Quigley & Moore, of St. Louis, Mo., they being apparently the lowest bidders for that item.

"By command of Brig. Gen. Casey:

"THOS. TURTLE,
"*Capt., Corps of Engineers.*"

(2d indorsement.)

"Rec'd Chicago, July 8, 1892.

"U. S. ENGINEER OFFICE,
"CHICAGO, ILL., *July* 8, 1892.

"Respectfully returned to the Chief of Engineers U. S. A.

"Under the terms of the specifications (par. 45) the awards for sand and pebble were to be made, if at all, to the contractors for that part of the canal trunk containing the deposits, delivery of sand and pebble to be considered with the earthwork, and under these terms, Monroe & Richardson, being the lowest bidders, for that part of trunk containing deposits, as well as for the lock-pit and foundation at lock 36, it was recommended that their bid for sand and pebble be accepted for lock 36 and guard-lock.

"W. L. MARSHALL,
"*Captain, Corps of Engineers.*"

(3d indorsement.)

"Rec'd eng'r department, July 11, 1892.

"OFFICE OF CHIEF OF ENGINEERS,
"U. S. ARMY, *July* 12, 1892.

"Respectfully returned to Captain Marshall, corps of engineers, who is authorized to accept Monroe & Richardson's bid for sand and

pebbles at lock No. 36. When such record as may be necessary has been made this paper will be returned to this office.

"By command of Brig. Gen. Casey:

"THOS. TURTLE,
"*Captain, Corps of Eng'rs.*"

IV.

On the 20th day of July, 1892, Captain Marshall forwarded to claimants the formal contract, annexed to and forming part of the petition, and bonds to be executed within ten days thereafter, all which claimants fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by Captain Marshall. The form of the contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases.

V.

Immediately upon receiving notice of the acceptance of their said bid claimants began preparation for the commencement of said work. They shipped their plant from Portsmouth, Ohio, to Rock Island, Ill.; rented and furnished a boat and had the same
17 taken to Rock river, in the vicinity of the work, to be used as a boarding-house for men employed on the work; built stables for their teams; hired men and teams; purchased a large amount of plant, consisting of shovels, plows, scrapers, and the like, and generally equipped themselves in a proper manner to expeditiously perform the work, and commenced the work with men and teams about the 1st day of August, 1892.

VI.

On the 6th day of August, 1892, without fault on their part and while the work was progressing, claimants were stopped by the United States and their contract abrogated against their consent, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day, and the United States refused to permit claimants to continue the work either under the terms of the contract or under the terms of the law of August 1, 1892, but immediately, and against the protest of claimants, readvertised and let the said work to other parties.

VII.

In the prosecution of said work under said contract, prior to the abrogation thereof on August 6, 1892, claimants expended the sum of $678.21, which has not been paid to them.

VIII.

By reason of the abrogation of said contract claimants lost the

following sums expended and were deprived of the following profits which they would have made in the execution of said work:

Expenses incurred	$678.21
Profits if they had been permitted to perform	7,150.00

Conclusion of Law.

Upon the foregoing findings of fact the court decide, as a conclusion of law, that the petition be dismissed.

Opinion of the Court.

NOTT, Ch. J., delivered the opinion of the court:

On the 1st of August, 1892, the contracting officer of the United States mailed the contract in suit at Chicago, duly executed by both parties, to the Chief of Engineers in Washington for his approval. It was immediately disapproved and returned to the officer with instructions to readvertise the work. This was done and the work was subsequently let to other parties. The contractors bring their suit accordingly for their losses sustained and gains prevented.

Whether the reason for which the Chief of Engineers disapproved the contract was a good and valid one the court has not been called upon to determine. The question involved in the case is, whether the approval of the formal contract by the Chief of Engineers
18 was essential to its validity, or, stated differently, whether in the circumstances of the case he could annul an otherwise valid contract by the mere act of his disapproval.

In Speed's case (8 Wall., 77) the Supreme Court held, concerning a contract which in terms provided that it should be subject to the approval of the commissary general, that his approval need not be in writing. This court had found from circumstantial evidence that the contract and the performance of the contractors under it were known to the commissary general and that he had indicated his approval by letter to the contracting officer, and the court had held that the contract had been approved. The decision was affirmed by the Supreme Court for the reason that neither the instrument itself nor any rule of law prescribed the mode in which the approval should be evidenced, and that a jury would have been justified in finding as this court had done. In this case the contract likewise contained a provision that "this contract shall be subject to approval of the Chief of Engineers." But there the resemblance between the two cases ends. In the former case the superior officer impliedly, though indirectly, and informally, approved; in this case, without laches or delay, he unequivocally disapproved.

In the somewhat similar case of Darragh (33 C. Cls. R., 377) it was held "that where a contract is in terms subject to the approval of the quartermaster general, approval is a condition precedent to the legal effect of the agreement." The counsel for the claimant seeks to take this case out of the rule of that decision by reason of certain peculiar facts and circumstances.

These facts and circumstances show that the printed form of the agreement was prepared by and furnished to the contracting officer by the Chief of Engineers, and therefore was within his knowledge and to that extent had his approval; that the contracting officer submitted the contractor's bids to the Chief of Engineers before entering into the contract and was duly authorized and empowered by the Chief of Engineers to accept the bids and enter into the agreement; that the objection of the Chief of Engineers did not relate to any provision of the contract, but was based simply upon the fact that he himself had not approved it before the 1st of August, 1892, when the act was passed making it penal for a contractor to permit or allow more than eight hours' work in any calendar day. (Act of August 1, 1892, 27 Stat. L., 340.)

As before said, it is not the duty of this court to pass upon the question whether the reason for which the Chief of Engineers disapproved the contract was valid and sufficient. Neither is the court required by the circumstances of the case to find whether there was an implied or circumstantial approval of the contract. The action of the Chief of Engineers was certainly prompt and unequivocal. If he had done nothing and had allowed the contractors to proceed with the work, and had approved vouchers for payment as the work progressed, it is probable that the case would be considered as coming within the rule sanctioned by the Supreme Court in Speed's case; but here the written formal contract, the final act of the parties, expressly provided in so many words "that this contract shall be subject to approval of the Chief of Engineers," and it is impossible for the court to hold that those words meant nothing, or that they meant that a prior contract had been approved by
19 the Chief of Engineers. On the contrary the court must reiterate the decision in Darragh's case and say that where a contract entered into by a subordinate is in terms subject to approval of his superior, approval is a condition precedent to the validity of the agreement.

In addition to gains prevented, the claimants seek to recover for certain expenses to which they were put by the action of the defendants' officers. The contract bears date the 19th July, 1892. It provides in terms that the contractors "shall commence work on or before the 1st day of August, 1892," but it appears by evidence *aliunde* that the instrument was not mailed to the contractors for signature until the 20th July, 1892; that it was returned for corrections; that it was not finally mailed for signature until the 27th of July, 1892, and that it was not signed by the contractors until some day between the 27th of July and the 1st of August, 1892. On the faith of the agreement executed by the contracting officer, but without his knowledge or direction, the contractors proceeded to make ready for their work and, indeed, performed to some extent, incurring thereby a loss of $678.21. This makes what is commonly called "a hard case." Nevertheless, if the approval of the Chief of Engineers was a condition precedent to the validity of the contract and the work was done without the knowledge or direction of the officer in charge and no benefit resulted thereby to the defendants it must be

held that the service was voluntary. The contractors acted in good faith, but at their own risk. No man can thrust a contract upon another. There must be agreement or something from which agreement can be inferred—request, acquiescence, knowledge or the retention of a consideration which can be returned. A contract cannot be implied from the voluntary acts of only one party.

The case has come before the court upon a motion of the defendants which their counsel has likened to a demurrer to the evidence. If it were being tried in any other court at *nisi prius*, the defendants might move, in like circumstances, that the claimants be nonsuited, or might demur to the evidence, or request the court to direct a verdict for the defendants. Here the claimants have closed their evidence and rested their case. In modern practice the defendants would be entitled in another court to test the sufficiency of the claimants' case in some way without being put to the trouble and expense of refuting it by evidence. If their motion, or demurrer, or whatever it might be, should be sustained, that would be the end of the case; if overruled, they would proceed with their defense. There is no objection to a like practice in this court. It may necessitate two arguments, but that is an objection which would also exist in any other court. Certainly the Government ought not to be put to the expense and trouble of taking evidence where a case can be disposed of on a question of law.

But inasmuch as the claimants may wish to appeal and the evidence cannot go up, this court will now find the facts and assess the damages which the claimants have suffered. The findings will then be, to all intents and purposes, a verdict taken subject to the opinion of the court. The claimants, as has been said, have exhausted their testimony, and the counsel for the defendants, in view of this motion, is content therewith. The case is simple for the reason that there has been no partial performance of the work. If the work had proceeded, as in the ordinary case of contract, to partial completion, the claimants would be entitled to the two elements of damage which the law recognizes, "losses sustained" and "gains prevented." (Bulkley's case, 7 C. Cls. R., 543; affirmed, 19 Wall. R., 37.) But in this case substantially nothing has been done, and it is simply their profits which must be a matter of computation. In the contemplation of all parties who enter into express agreements it is supposed and understood that a reasonable profit shall be made by him who performs. (Bulkley's case, *supra*.) It is a matter of judgment what a reasonable profit is, and there have been numerous cases before the court showing that from 10 to 25 per cent. is regarded, prospectively, as the range of profits which contractors hope or expect to make. Taking this in connection with the evidence in the case, the court finds the amount which the claimants would have made if they had been permitted to perform and the amount of the expenses which they have incurred upon the faith of the contract which they signed; but upon the law the court holds that judgment must be for the defendants.

The judgment of the court is that the petition be dismissed.

20 *Judgment of the Court.*

MONROE AND RICHARDSON
v.
UNITED STATES. } No. 20003.

At a Court of Claims held in the city of Washington on the 26th day of February, A. D. 1900, judgment was ordered to be entered as follows:

The court on due consideration of the promises find for the defendants and do order, adjudge and decree that the petition of the said claimants be dismissed.

BY THE COURT.

21 *Application for and Allowance of Appeal.*

SAMUEL MONROE and DAVID M. RICHARDSON, Late Copartners Trading as Monroe and Richardson,
v.
UNITED STATES. } No. 20003.

From the judgment rendered in the above-entitled cause on 26th day of February, 1900, in favor of the defendants, the claimants, by their attorney of record, John C. Fay, on this 7th day of April, 1900, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN C. FAY,
Attorney for Claimants.

SAMUEL A. PUTMAN.

Filed April 7, 1900.

Ordered, that the foregoing application for appeal be allowed as prayed for.

April 7, 1900.

BY THE COURT.

22 Court of Claims.

SAMUEL MONROE and DAVID M. RICHARDSON
vs.
UNITED STATES. } No. 20003.

I John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set m
the seal of said Court of Claims this 14th day of

[Seal Court of Claims.]

JOHN RANI
Ass't Cler

Endorsed on cover: File No. 17,819. Court
No. 98. Samuel Monroe and David M. Richards
trading as Monroe and Richardson, appellan
States. Filed June 29th, 1900.

NITED STATES.

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of April A. D. 1900.

ANDOLPH,
Clerk Court of Claims.

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llants, *vs.* The United

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 98.

SAMUEL MONROE ET AL., TRADING AS MONROE AND RICHARDSON,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

JOHN C. FAY,
Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 944

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 98.

SAMUEL MONROE ET AL., TRADING AS MONROE AND RICHARDSON,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

STATEMENT.

This was a suit brought in the Court of Claims by the appellants to recover for losses resulting to them by reason of the abrogation of a contract with the United States.

The facts out of which the claim arose were as follows:

About the 25th of May, 1892, Capt. W. L. Marshall, of the United States Corps of Engineers, then stationed in Chicago, advertised for proposals for the construction of a canal known as the Illinois and Mississippi canal. Bids, which were required to be made on certain blank forms furnished by the

engineer's office and accompanied by the usual bond, were submitted by the appellants in due time, and were opened June 25, 1892. The bid of the appellants, being the lowest, after being referred to the Chief of Engineers and considered by him, was accepted by Captain Marshall, and a formal written or printed contract furnished to Captain Marshall by the Chief of Engineers was duly executed by the appellants and Captain Marshall, signed in accordance with all the requirements of section 3744 of the Revised Statutes, on or about the 27th of July, 1892 (Contract, R., pp. 4–7).

Immediately thereafter, on the 1st of August, the appellants commenced work and prosecuted the same until the 6th of August, when they were notified to cease work, and their contract was abrogated. The alleged reason for this abrogation of their contract was that the said written contract had not been actually approved in writing before the 1st of August, 1892, on which date the act of August 1, 1892 (27 Statutes, 340), went into effect, prohibiting a contractor requiring more than eight hours' work in any calendar day from his workmen, and for the reason that said formal contract did not have that provision in it, although made before the 1st of August, 1892, the Chief of Engineers did not consider himself empowered to indorse the word "Approved" on said contract after August 1, 1892, and thereupon returned it to Captain Marshall unindorsed.

The work was then readvertised and let to other bidders. The claimants brought this suit to recover the amount of money expended by them in the prosecution of the work they did perform and the loss of the profits that would have accrued to them if they had performed the entire contract.

The Court of Claims in its finding of facts found that the claimants expended $678.21 in the prosecution of the work, and would have received $7,150 profit on the work had they been permitted to perform it, making an aggregate loss to them of $7,828.21, but found as a conclusion of law that the failure of the Chief of Engineers to write upon the con-

tract the word "Approved" rendered it invalid, and thereupon dismissed the claimants' petition.

ASSIGNMENT OF ERRORS.

I. The court erred in holding as a matter of law that the contract was invalid by reason of the failure of the Chief of Engineers to formally approve the same.

II. The court erred in holding that the contract between the United States and the appellants, executed on or about the 19th day of July, 1892, and signed at the end thereof by W. L. Marshall, captain of the Corps of Engineers, in behalf of the United States, and the appellants, set out on pages 4, 5, 6, and 7 of Record, was not a valid, binding contract upon the United States.

BRIEF.

There is but one question involved in this suit, and that a narrow one, to wit, whether or not a contract entered into after due advertisement, under competitive bidding, after the bids had been submitted to the Chief of Engineers, after an examination and some correspondence relative to the bid with the contracting officer, and a written direction to him to accept the bid of the appellants, his acceptance of their bid, the preparation of the formal contract on a blank furnished by the Chief of Engineers, its execution by both the contracting officer and the claimants, in due form and in strict accordance with the provision of section 3744 of Revised Statutes, is to be deemed a binding contract upon the United States, because the Chief of Engineers failed to write upon it the word "Approved."

The learned court below held that this was a fatal defect in the contract, and in this we respectfully submit the court erred.

Aside from the provision of section 3744 relating to the making of contracts by the United States, there could be no question but that the advertisement, the proposals, and the acceptance constituted a valid contract. This court has so held in many cases, and particularly in the case of Garfielde *vs.* The United States, arising under a contract between the Post Office Department and Garfielde, which contracts are not embraced in the terms of the above section (93 U. S., 242).

And while this court has held in Clark's case (95 U. S., 539) that a signature at the *end of a contract* is mandatory and necessary to make it valid, it would be carrying the doctrine beyond the terms of section 3744 to hold that not only must the officer making the contract sign it *at the end thereof*, but also that the approving officer must write "Approved" and sign that at the *end thereof*.

The officer "appointed to make this contract" was Capt. W. L. Marshall. He reduced it to writing and signed it at the *end thereof*, and permitted the appellants to go to work under its provisions and continue work for six days; in fact, the contract itself provides that work shall commence on the first day of August, 1892, and in the event that the appellants failed to commence work on that day the captain of engineers reserved the power to annul the contract (R., p. 6). There was nothing in the advertisement, in the bid, or in the proposal or in the acceptance of the bid that required an approval by the Chief of Engineers, and there is certainly nothing in the record anywhere that requires the approval to be made in any particular form.

In the case of The United States *vs.* Speed (8th Wallace, 75 U. S., p. 77), the court, in passing upon the question of approval of a contract by the Commissary General, and in disposing of the objection that that contract was not approved by the Commissary General, says:

"We are of opinion that, taking this altogether, it is a finding by the court, as a question of fact (*i. e.*, an expression

from the Commissary General to his subordinate of his satisfaction at the progress made in the work) that the contract was approved by that officer; and inasmuch as neither the instrument itself, nor any ruling of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did."

In this case, after the bids were submitted, Captain Marshall forwarded them to the Chief of Engineers, with the recommendation that the bid of the appellants for certain portions of the work be accepted (Finding 3, p. 9). The Chief of Engineers returned them to Captain Marshall, authorizing him to accept the appellants' bid for a part of the work, which he recommended be awarded to them, and wanting to know why another part of the work was not let to another bidder, who was apparently lower than the appellants. Captain Marshall returned the communication with the information that all the items awarded to Monroe & Richardson were by the advertisement required to go together, and they being the lowest bidders on all the items their bid could not be segregated and part of it awarded to another bidder. The Chief of Engineers thereupon returned that communication to Captain Marshall and directed him to accept the appellants' bid for the whole of their bid, and thereupon furnished him with the form of contract to be executed by them, which form was strictly followed.

If these facts do not constitute an approval by the Chief of Engineers of this contract, it is difficult to imagine what would. It must be borne in mind that a written paper is only the evidence of a contract. The contract was made before the written paper. In the language of the statute, it was reduced to writing. It existed before its reduction to writing, and as it existed it was approved.

After it was reduced to writing the Chief of Engineers was only concerned to see that it corresponded with his already given approval.

The learned Chief Justice in his opinion says:

"That the Chief of Engineers unequivocally disapproved the contract." The findings do not show such action. The Chief of Engineers conceived himself forbidden to act on the paper by reason of the act of August 1, 1892. He did not suggest that the terms of the act of August 1, 1892, should be incorporated in the contract, nor did he give the appellants an opportunity to insert that proviso, but "abrogated" it. If he abrogated a contract, it must have existed.

In the sixth finding the court distinctly finds that "their *contract was abrogated* against their consent, and the work they had *contracted to do* readvertised." If that state of facts existed, as the findings show, there must have been a contract.

In any view of the case, it is respectfully submitted that the court erred in failing to treat the contract sued on as a valid instrument.

The judgment of the court should be reversed, and judgment ordered to be entered in favor of the appellants in the sum of $7,828.21, as damages assessed by the Court of Claims.

JOHN C. FAY,
Attorney for Appellants.

No. 98.

Brf. of Atty. Gen.l (Collins & Pradt)
for Appellees.

Filed Jan. 4, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SAMUEL MONROE AND DAVID M. RICHARDSON, late copartners trading as Monroe & Richardson, appellants,
v.
THE UNITED STATES, APPELLEES.

No. 98.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

FRANKLIN W. COLLINS,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SAMUEL MONROE AND DAVID M. RICHARDSON, late copartners, trading as Monroe & Richardson, appellants,
v.
THE UNITED STATES, APPELLEES,

No. 98.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

STATEMENT.

The essential facts in this case can not be more fairly or succinctly stated than as found in the language of the Court of Claims in its opinion herein as delivered by Mr. Chief Justice Nott, wherein in the first paragraph thereof the court says:

> On the 1st of August, 1892, the contracting officer of the United States mailed the contract in suit at Chicago, duly executed by both parties, to the Chief of Engineers in Washington for his approval. It was immediately disapproved and returned to the officer with

instructions to readvertise the work. This was done and the work was subsequently let to other parties. The contractors bring their suit accordingly for their losses sustained and gains prevented. (35 C. Cls., p. 203.)

ARGUMENT.

I.

THE EXISTENCE OF AN EXPRESS CONTRACT IS NOT SHOWN BY THE RECORD.

The last clause of the last paragraph of the statement which precedes the brief of the learned counsel for the appellant (pp. 2 and 3, appellant's brief) does not correctly recite the facts. The learned counsel states that the Court of Claims "found as a conclusion of law that the failure of the Chief of Engineers to write upon the contract the word 'approved' rendered it invalid, and therefore dismissed the claimant's petition;" whereas, the Court of Claims did not narrowly find as a conclusion of law that "the failure of the Chief of Engineers to *write upon the contract the word 'approved' rendered it invalid;*" and said language nowhere appears in the findings of said court, its conclusions of law, or in the opinion accompanying the same, nor can the language used by the Court of Claims in connection with the said case be interpreted in this manner.

The Court of Claims simply stated as its conclusion of law upon the findings of fact that "the petition should be dismissed." The opinion of the court goes further and distinctly declares that it (meaning the

contract) was immediately disapproved (35 C. Cls. R., 203), and further held that in case of a written formal contract, where the final act of the parties expressly provided in so many words that this contract shall be subject to the approval of the Chief of Engineers, it is impossible for the court to hold that these words *meant* nothing or that they meant that a prior contract had been approved by the Chief of Engineers, and that the court must reiterate the decision in *Darragh's case* (33 C. Cls. R., 377) and say that where a contract entered into by a subordinate is in its terms subject to the approval of his superior, approval is a condition precedent to the validity of the agreement (25 C. Cls. R., pp. 203 and 205). So that the question in controversy is not simply, as stated by opposing counsel, that the mere failure of the chief of engineers to write upon the contract the word "approved" rendered it invalid, but is much broader and it is rather to be stated in this way: *When a contract, in its terms, is subject to the approval of the Chief of Engineers, and that approval is not obtained, the agreement, in the absence of such approval, is not a valid, binding, and subsisting contract between the parties.* Certainly, without the approval specified it lacks one of the essential ingredients of a contract. In this case the approval of the Chief of Engineers was a condition precedent to the validity of the contract, and the record in this case shows that this approval was never obtained. On the contrary, it appears that when the contract was presented to the Chief of Engineers for approval it was immediately disapproved and the

appellant notified accordingly. That this approval is a condition precedent to the validity of a contract in which it appears as one of its clauses is so clear and elementary as a principle of law that the citation of authorities to support it would seem to be almost superfluous. The Court of Claims had previously announced the same doctrine in the case of *Darragh* v. *United States* (33 C. Cls. R., 377). That suit was almost identical with the one at bar. This court has uniformly declared itself in the same manner. In the case of *Ware* v. *Allen* (128 U. S., 593), which was brought in the circuit court of the United States for the southern district of Mississippi, Ware was the plaintiff in the court below, and from a decree dismissing his bill he appealed to this court. The suit was brought on a promissory note, which was obtained by the appellant of the appellees upon the distinct understanding that the same was to be of no effect unless, upon an after consultation with two attorneys whom the appellees desired to consult, the appellees should be assured by said attorneys, and each of them, that certain proceedings connected with the collection of a claim held by the appellees against the appellant's brother were lawful, and the attachment which had issued from the court could be enforced.

As soon as the defendants could do so they asked one of the attorneys mentioned for his opinion, and he declined to give it, or to take any part in the matter.

The other counsel was seen and disapproved of the

arrangement in emphatic terms, and advised the defendants to have nothing to do with it.

The testimony established this agreement made before the delivery of the instrument sued on—that the defendants were to have opportunity to consult their counsel as above, and as to the validity of the transaction, and that if their advice was adverse then the instrument given by them was to be of no effect.

It further established that one of the counsel referred to advised them that the transaction would not stand the test of a legal investigation.

The court in that case, in rendering its opinion, through Mr. Justice Miller, said:

> We are of opinion that the evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred.

The same reasoning is applicable to the present suit, and in a stronger sense, in that the condition precedent of the contract herein was embodied in and formed a part of the written contract, whereas in the case cited the agreement whereby the transaction was to be submitted to counsel before the contract should be binding on the parties was established by parol testimony.

Here was a condition, clearly expressed, which must be complied with before the agreement between the parties should become a valid and binding contract. It was essentially a condition precedent. (Am. and

Eng. Ency. Law, 2d ed., pp. 118 and 119, and footnote 4.)

In *Redmond* v. *Etna Ins. Co.* (49 Wis., 43), the court said:

> A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect. That is to say, the contract is made in form, but does not become operative as a contract until some future specified act is performed or some subsequent event occurs. (*Wellington* v. *West Boylston*, 4 Pick. (Mass.), 101; *Hunt* v. *Livermore*, 5 Pick. (Mass.), 395; *Jarvis* v. *Rogers*, 3 Vt., 339.)

A strikingly similar case to the one under consideration is that of the *Governor, Guardians, etc., of the Poor* v. *Petch* (28 Eng. L. and Eq. R., p. 470). In that case the action was brought against the defendant, a butcher, for breach of his contract to supply the workhouse at Kingston-on-the-Hull with meat pursuant to his contract. Among the pleas interposed by the defendant was that of nonassumpsit.

The plaintiff being desirous of securing tenders for meat, etc., for the use of the poor (syllabus), issued advertisements stating that they would receive tenders for the supply of the workhouse with meat for three months, from 30 to 50 stone (setting out the description of the meat); that sealed tenders were to be forwarded to the clerk, and that all contractors would

have to sign a written contract after acceptance of tender. The defendant wrote the plaintiffs as follows:

> I propose to supply your house with meat according to advertisement, for the ensuing three months, at 6d. per pound.

The defendant's proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined the appointment:

> Held, that the transaction amounted merely to a proposal for a contract, and that there was no binding contract until a written agreement had been signed.

Likewise the Court of Claims held herein that there was no binding contract between the appellants and the United States until the contract had been approved by the Chief of Engineers, which was never done.

The case of *Wilson* v. *Powers* (131 Mass., 539) is of interest, and it also sustains the Government's contention.

This was a suit brought against a surety on a promissory note, which surety set up as a defense that he was discharged from liability by a written agreement entered into between the holder and the principal to extend the time of payment. Evidence was offered by the plaintiff that a conversation took place at the time of the delivery of the agreement by the holder to the principal, and of a conversation between them prior to the date of the agreement, to the effect that it should become binding only on the assent of the surety, and the court held such evidence admissible.

The supreme court of Massachusetts, speaking through Devens, J. (131 Mass., pp. 540 and 541), said:

> At the trial the defendants relied upon a certain instrument as discharging them from their obligation as sureties, by which Wilson, the promissee of the note, as it was contended, agreed to extend the time of payment of the note to the principal, defendant, without the assent of the sureties. It was contended by the plaintiff that the instrument signed by Wilson was delivered by him as a proposition merely, and upon the agreement that it should become binding only upon the assent of the sureties thereto. The manual delivery of an instrument may be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to work any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced. (*Whittaker* v. *Salisbury*, 15 Pick., 534; *Davis* v. *Jones*, 17 C. B., 625; *Murray* v. *Earl of Stare*, 2 B. and C., 82; *Pym* v. *Campbell*, 6 E. L. and B. L., 370; *Wallace* v. *Lattell*, 11 C. B. (N. S.), 369.)
>
> Evidence was admitted of the conversation which took place at the time of the actual delivery of the instrument to Welsh by Wilson, and also of a previous conversation before the date of the instrument and before it was written, to the effect that it should become binding only upon the assent of the sureties. The defendants contend that even if all that took place at the time of the delivery was admissible as an explanation thereof and as a part

> of the res gestæ, yet that the evidence of the previous conversation was erroneously admitted. But a previous conversation might, and in this case apparently did, have a direct bearing upon the question whether the delivery was conditioned. Wilson, at the time of the delivery, stated that "this was his proposition, and it was in writing;" and the previous conversation clearly related to such an instrument as a proposal only. Whether the delivery of a paper is absolute or conditional is a question of fact. If it were shown that two parties had agreed that an instrument should be thereafter prepared to take effect only upon compliance with a certain condition or the occurrence of a certain event, and thereafter such an instrument were prepared and delivered, even if nothing was said at the time of the actual delivery, it would be for the jury to say whether such delivery did not take place under and in pursuance of a previous agreement. That a delivery should be conditional it is not necessary that express words to that effect should be used at the time. That conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they preceded or accompanied the delivery.

So here our contention is that the contract in question was never in fact a contract binding and operative, but merely a proposal for a contract which was never finally and formally accepted, and hence its obligation never commenced. That this contention is

fully justified by the facts in the case is unquestionable. This was a case where the proposed contract expressly provided that the same was to be subject to the approval of the Chief of Engineers. It was therefore understood and agreed by and between the parties thereto that the approval of said officer was to be obtained prior to the operation of said contract. It follows, therefore, that until such approval was obtained the writing between the parties was a mere proposal for a contract, which only became a contract on the fulfillment of the indispensable prerequisite and condition precedent to its validity, to wit., the approval of the Chief of Engineers.

This is exactly in line with the doctrine so frequently announced by law writers and by the courts that "where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." (7 Am. and Eng. Ency. L., 2d ed., p. 140, and footnotes thereto.)

A case which bears a striking similarity to the present suit is that of *Soper* v. *The Buffalo & Rochester Ry Co.* (19 Barb., 310). The syllabus reads as follows:

> The defendants advertised that they would receive proposals on a specified day for clearing, grubbing, grading, and fencing the line of direct railroad between Batavia and Buffalo. The plaintiff and H. submitted proposals for doing the work and entering into a written

contract. On a subsequent day the directors of the defendants had a meeting, at which, for want of time to examine the various proposals which had been made, a resolution was passed that such proposals be referred to the executive committee and superintendent, to close a contract with such of the persons making the proposals and upon such terms as they should consider most advantageous to the interests of the company. It did not appear that the committee ever met or acted upon the matter thus referred to them. Held, that these facts were not sufficient to prove that the plaintiff's proposition was accepted or that a contract was entered into between the parties for the doing of the work, and that the declarations of individual directors of the defendants, made immediately after the close of the meeting at which the propositions were submitted, to the effect that the proposal of the plaintiff and H. were accepted, were not competent evidence to establish that fact.

The court, in its opinion in the above case, delivered through Mr. Justice Strong, among other things, says:

> It was not true that the executive committee and superintendent ever met or acted upon the subject of the proposals. These facts fall entirely short of sustaining the position that a contract was entered into between the defendants and the plaintiff for the doing of the work. The proposition of the latter was not accepted, the directors did not act upon it, except by referring it to a committee, and this committee did nothing in relation to it.

And so in the case at bar, the facts fall entirely short of sustaining the contention of the appellants that a contract was entered into between the United States and the appellants for the doing of the work under the proposed contract. The proposition of the appellants was not accepted, inasmuch as the Chief of Engineers never approved the contract, but, on the contrary, immediately disapproved the same, of which action the appellants were duly and without delay notified.

The same principle finds expression and lends additional weight to the Government's contention in the case of *Sumner* v. *Stewart* (69 Pa. St., 321).

The learned counsel for the appellants relies upon the decision of this court in the case of the *United States* v. *Speed* (8 Wall., p. 84), in which this court, speaking through Mr. Justice Miller (pp. 83 and 84), says:

> The contract was not approved by the Commissary-General.
>
> The agreement contained a provision that it is subject to the approval of that officer. The Court of Claims finds that while no copy of the agreement was presented to the Commissary-General for formal approval, Major Simonds wrote him a letter informing him substantially of its terms, to which he replied, expressing his satisfaction of the progress made; and the court further finds, as a conclusion of law, that the letter of the Commissary-General was a virtual approval of the contract. We are of opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer, and inasmuch as

> neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did.

That the authority of Speed's case does not support the contention and position of appellant's counsel is very apparent, and can not perhaps be better disposed of than by quoting the language of Mr. Chief Justice Nott in delivering the opinion of the Court of Claims in this case (p. 12, Rec.: 35 C. Cls. R., p. 204):

> In *Speed's case* (8 Wall., 77) the Supreme Court held, concerning a contract which in terms provided that it should be subject to the approval of the Commissary-General, that his approval need not be in writing. This court had found from circumstantial evidence that the contract and the performance of the contractors under it were known to the Commissary-General, and that he had indicated his approval by letter to the contracting officer, and the court had held that the contract had been approved. The decision was affirmed by the Supreme Court for the reason that neither the instrument itself nor any rule of law prescribed the mode in which the approval should be evidenced, and that a jury would have been justified in finding as this court had done. In this case the contract likewise contained a provision that "this contract shall be subject to the approval of the Chief of Engineers." But there the resemblance between the two cases ends. In the former case the superior officer impliedly, although indirectly and informally, approved; in this case,

> without laches or delay, he unequivocally disapproved. * * *
>
> As before said, it is not the duty of this court to pass upon the question whether the reason for which the Chief of Engineers disapproved the contract was valid and insufficient. Neither is the court required, by the circumstances of the case, to find whether there was an implied or circumstantial approval of the contract. The action of the Chief of Engineers was certainly prompt and unequivocal. If he had done nothing and had allowed the contractors to proceed with the work, and had approved vouchers for payment as the work progressed, it is probable that the case would be considered as coming within the rule sanctioned by the Supreme Court in Speed's case; but there the written formal contract, the final act of the parties, expressly provided in so many words "that this contract shall be subject to the approval of the Chief of Engineers," and it is impossible for the court to hold that these words meant nothing, or that they meant that a prior contract had been approved by the Chief of Engineers. On the contrary, the court must reiterate the decision in Darragh's case and say that where a contract entered into by a subordinate is in its terms subject to the approval of his superior, approval is a condition precedent to the validity of the agreement.

It is difficult to imagine how the law of the case could be stated more lucidly or soundly than it has been stated by the Court of Claims in this case. The mere acceptance of the bid of the appellants was a

matter purely preliminary to the final execution and approval of the contract and had no binding force or effect prior to the execution and delivery of the contract itself and its final approval by the Chief of Engineers, and that the Chief of Engineers should have directed his subordinate to accept the bid of the claimants was in no sense an approval of the contract, which at that time was not in existence, and which, when subsequently drawn up and presented to the Chief of Engineers, was immediately disapproved by him and the appellants duly and promptly notified accordingly.

As suggested by Mr. Chief Justice Nott, with the validity and sufficiency of the reason or reasons assigned by the Chief of Engineers for his disapproval of the contract, neither this court nor the lower court have anything to do. As this court said in *Speed's case*, *supra* (8 Wall., 83), "where there is a discretion of this kind conferred on an officer or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise." Citing *Philadelphia & Trenton R. R. Co.* v. *Stimson* (14 Pet., 448); *Martin* v. *Mott* (12 Wheat., 19); *Royal Br. Bank* v. *Turquand* (6 Ellis & Blackburn, 327); *Machleu* v. *Sutherland* (25 Eng. L. & Eq., 114); and *Ross* v. *Reed* (1 Wheat., 482) This doctrine, so repeatedly reiterated by this court, is so sound and well settled that it is not open to question or controversy.

II.

NO IMPLIED CONTRACT.

We have heretofore endeavored to show that there was no express contract between the parties, and inasmuch as if the above condition precedent had been fulfilled the proposed contract would have been an express contract, there is no room for an implied contract in this case. If a contract at all, it was an express contract. In his work on contracts, Story defines an implied contract as follows (sec. 11, 5th ed., Story on Contracts):

> Where the agreement is a matter of inference and deduction it is called an implied contract. Both species of contract, however, are equally founded on the actual agreement of the parties, and the only distinction between them is in regard to the method of proof, which belongs to the law of evidence. In an implied contract the law only supplies that which, although not stated, must be presumed to have been the agreement of the parties.

In the contract in question everything was expressed, and there can be no implication in conflict with what is expressed. (Wharton on Contracts, 1882 ed., paragraphs 708, 709, and cases there cited.) It is also a well-settled principle of law that an implied contract does not arise from the expectation of the parties. (*Maryland* v. *R. R. Co.*, 22 Wall., 105.)

III.

NO QUANTUM MERUIT.

In this case there can be no quantum meruit, inasmuch as there was no contract, either expressed or implied, and hence no contractual relation existed between the parties, but in any event the findings of the Court of Claims (see finding 8, pp. 11 and 12 of the record) are confined to expense incurred and gains prevented. There were no services rendered or partial completion of work under the proposed contract. As stated by Mr. Chief Justice Nott, in delivering the opinion of the Court of Claims, *supra*, the case is simple, "for the reason that there has been no partial performance of work." Manifestly, then, the question of quantum meruit is eliminated and need not be further considered.

IV.

THE FINDINGS OF FACT.

The learned counsel for the appellant endeavors to secure a purely technical advantage from the language used in the sixth finding of fact heretofore made by the Court of Claims (see p. 11), for the reason that the same speaks of the abrogation of the contract, but this court will not permit any unfair advantage to be taken or injustice to be done either party by reason of language and terms clearly inadvertently used, in view of the unmistakable facts in the case. These plainly appear from the whole record, as well as the opinion of the court, to which attention has heretofore been called.

Appellants' counsel takes further exception to the language contained in the opinion of the chief justice of the Court of Claims wherein he says that "the Chief of Engineers unequivocally disapproved the contract," and states that the findings do not show such action.

The findings nowhere show the approval of the contract as required by the contract itself. A copy of said contract is attached to and made a part of the petition and record in this case, and in its last provision says, "This contract shall be subject to the approval of the Chief of Engineers, U. S. A." The petition itself nowhere alleges that said contract was approved by the Chief of Engineers, and leaves the presumption against the pleader, namely, that said contract was never approved.

Furthermore the record shows (p. 8) that this case came before the lower court on a motion to quash the petition and dismiss the case, on the ground "that this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect, as follows: 'This contract shall be subject to the approval of the Chief of Engineers U. S. A.' Not only does the contract itself, a copy of which is attached as above, fail to show that the same was never approved by the Chief of Engineers, U. S. A., but the testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever."

This motion was argued *in extenso* before the court by counsel for both parties, and all of the claimant's testimony having been taken the same was brought to the attention of and fully considered by the court, and thereupon, after said hearing, the lower court sustained the Government's motion, and dismissed the petition of the claimant, *all of which the record in this case fully discloses.*

The conclusion is therefore irresistible that this action of the Court of Claims, founded as it is upon a motion which demanded the dismissal of the petition of the claimant *on the sole ground and for the single reason that "the contract was never approved by the Chief of Engineers,"* is clearly tantamount to a finding of fact by the Court of Claims that the contract was not approved by said officer, and should be so treated, considered, and adjudged by this court.

In compliance with rule 4 of this court, the Court of Claims made and filed formal findings of fact in conjunction with their conclusions of law, explaining said action, as follows:

> Inasmuch as the claimants may wish to appeal and the evidence can not go up, this court will now find the facts and assess the damages which the claimants have suffered. The findings will then be, to all intents and purposes, a verdict taken *subject to the opinion of the court.* (Rec., p. 14.) (The italics are ours.)

So that the record in this case conclusively shows that the contract in question was never approved by the Chief of Engineers, U. S. A.

Counsel for the defendant, while convinced that the findings of fact herein and record accompanying the same sufficiently state the facts, yet to eliminate all question as to their sufficiency and obviate the necessity for argument in this court upon this question, filed a motion for a new trial and to amend the findings of fact in the Court of Claims, which motion, on December 2, 1901, was overruled, and a copy of the court's opinion therein is annexed to this brief as an appendix, and this court's attention is directed to the same, as well as to the reasons which induced the Court of Claims to overrule said motion.

As to the real facts in the case, however, there can be no question, and that the contract in question was never approved, either directly or indirectly, actually, circumstantially, or inferentially, by the Chief of Engineers, is also beyond the pale of doubt, and inasmuch as the petition nowhere recites the approval of this contract by the Chief of Engineers, neither do the findings of fact recite its approval by the Chief of Engineers, and inasmuch as this case comes to this court on an appeal from a final judgment rendered by the Court of Claims sustaining a motion made on behalf of the United States in said court to quash the petition filed therein and dismiss the case, for the reason that the contract was never approved by the Chief of Engineers, and inasmuch as both opinions of the Court of Claims fully sustain, explain, and support this fact it is respectfully submitted that this controlling fact is fully and sufficiently stated.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

FRANKLIN W. COLLINS,
Special Attorney.

LOUIS H. PRADT,
Assistant Attorney-General.

APPENDIX.

Court of Claims, No. 20003.

(Decided December 2, 1901.)

SAMUEL MONROE AND DAVID M. RICHARDSON *v.* THE UNITED STATES.

NOTT, Ch. J., delivered the opinion of the court:

Judgment was rendered in this case on the 26th of February, 1900, in favor of the defendants (35 C. Cls. R., 199). The claimants appealed and the case is pending in the Supreme Court upon appeal.

The defendants now come into this court and move the court to set aside the judgment heretofore rendered in their favor and to grant a new trial thereon "under and by virtue of the provisions of section 1088 of the Revised Statutes," which authorizes the court to grant a new trial at any time within two years after the rendition of a judgment where "any fraud, wrong, or injustice in the premises has been done to the United States."

As the judgment was wholly in favor of the United States, it can not be said that "fraud, wrong, or injustice" was done them by it. Apart from the statute, the court has no jurisdiction of the case. Jurisdiction was lost when the record of appeal was sent up. (*Ex parte Russell*, 13 Wall. R., 664, 670; *Ex parte Roberts*, 15 id., 384, 387.)

If the findings do not sufficiently present the questions of law involved, the proper course for the defendants to pursue is to apply to the Supreme Court for an order remanding the case, or requiring this court to find the additional facts; and if the Supreme Court is of the opinion that the facts sought are necessary to the proper consideration of the case, and that the defendants are entitled to have them found, relief will undoubtedly be granted (*Raymond's Case*, 11 C. Cls. R., 477, 491; *United States* v. *Adams*, 9 Wall. R., 661.)

It is proper, however, to add, that if the motion be left to the discretion of this court no amendment of the findings is deemed necessary. The only point involved in the case, and the only fact really sought by the defendants, is a formal finding that the contract was not approved by the Chief of Engineers. We are of the opinion that that fact sufficiently appears upon the record.

In the first place, the contract is set up by the claimants and annexed to their petition. The contract so set up in its last provision says: "This contract shall be subject to approval of the Chief of Engineers, U. S. A." The petition sets up nothing more, and leaves the presumption against the pleader, namely, that the contract never was approved.

In the second place, the case was brought before the court by the claimants' motion to dismiss the petition upon the ground "that this action is founded on a contract, a copy of which is annexed to the said petition and made a part thereof, which contains a specific provision of the tenor and effect as follows: 'This contract shall be subject to approval of the Chief of Engineers, U. S. A.'" The motion also avers that "the testimony in the case fully and conclusively shows, and

the same is not denied by the claimants, that said contract has never been approved by the said Chief of Engineers." The defendants requested no findings of fact. The requests made by the claimants were treated by both parties as correctly setting forth the facts involved. The court accordingly adopted them without objection, treating the motion as a demurrer to the evidence, allowed it, and dismissed the petition. The motion, with its allowance by the court, is a part of the record, and sets forth the fact desired as fully as it could be done by a formal finding of the fact.

The motion of the defendants is overruled.

No. 98.

Sup. Ct. Br. of Attorney General (Pradt & Collins) for U.S.

Filed Jan. 14, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SAMUEL MONROE AND DAVID M. RICHARDSON late copartners, trading as Monroe & Richardson, appellants,
v.
THE UNITED STATES, APPELLEES.

No. 98.

ON APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SAMUEL MONROE AND DAVID M. RICHARDSON, late copartners, trading as Monroe & Richardson, appellants,
v.
THE UNITED STATES, APPELLEES.
No. 98.

ON APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF OF ARGUMENT ON BEHALF OF THE UNITED STATES.

Whatever reliance the appellants may place upon the *Garfielde case* (93 U. S., p. 242) is clearly negatived by the fact that, under the provisions of the statute of the United States (sec. 3744, R. S.), neither the Postmaster-General nor any of the contracting officers in his Department are required to reduce their contracts to writing and have said contracts signed by the contracting parties, as in the case of the Secretaries of War, Navy, and Interior, and the officers under these Departments.

If the appellants' contention be correct, then this court erred in its decision in the case of *South Boston Iron Company* v. *United States*, (118 U. S. p. 37) in which case the court reaffirmed the doctrine announced in *Clark's case* (95 U. S., p. 539).

In the case of *Whiteside et al.* v. *United States* (93 U. S., p. 254), among other things, the court announced the doctrine contended for herein, that where a contract requires the approval of a superior and that approval is not obtained, the contract is incomplete, and is in fact null and void.

FRANKLIN W. COLLINS,
Special Attorney.
LOUIS A. PRADT,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 98.—October Term, 1901.

Samuel Monroe and David M. Richardson, late Copartners trading as Monroe and Richardson, Appellants, *vs.* The United States. } Appeal from the Court of Claims.

[March 10, 1902.]

The appellees brought suit against the United States in the Court of Claims for the sum of $25,485.89, for expenses incurred and for damages. The latter consisted of losses suffered by them by the breach of a contract entered into by the United States through W. S. Marshall, Captain in the Corps of Engineers. The contract was made in pursuance of an advertisement made by the United States, inviting proposals for constructing a canal to be known as the Illinois and Mississippi Canal, upon the terms, conditions and specifications set forth in an exhibit which was attached to and made a part of the petition.

The contract contained the following clause: "This contract shall be subject to approval of the Chief of Engineers, United States Army." There was no averment that the contract had been so approved, and the United States demurred. The demurrer stated: "Not only does the contract itself, a copy of which is attached as above, fail to show that the same was ever approved by the Chief of Engineers, U. S. A., but the testimony in the case fully and conclusively shows, and the same is not denied by the claimant, that said contract has never been approved by the said Chief of Engineers, U. S. A., in any manner whatsoever."

It was prayed that the petition "be quashed and the action be dismissed accordingly."

The action of the court is expressed in the following order: "Allowed in part and judgment for defendants on findings of fact filed."

As a conclusion of law from the findings the court ordered the petition dismissed and a formal judgment was entered accordingly. (35 Court of Claims Rep. 199.) This appeal was then taken.

The findings of fact are as follows:

On or about the 25th of May, 1892, the United States through W. S. Marshall, a Captain in its Corps of Engineers, advertised for proposals for constructing a canal to be known as the Illinois and Mississippi Canal. The claimants submitted a bid to do certain parts of the work. The bid was accepted by Captain Marshall, acting under an authority contained in a letter from the Chief of Engineers of the United States Army.

"On the 20th day of July, 1892, Captain Marshall forwarded to claimants the formal contract, annexed to and forming part of the petition, and bonds to be executed within ten days thereafter, all which claimants fully executed and returned to the said engineer on the 28th day of July, 1892, which formal contract was duly signed by Captain Marshall. The form of the contract had been prepared by the Chief of Engineers and forwarded to Captain Marshall for use in such cases.

"Immediately upon receiving notice of the acceptance of their said bid *claimants began* preparation for the commencement of said work. They shipped their plant from Portsmouth, Ohio, to Rock Island, Ill.; rented and furnished a boat and had the same taken to Rock River, in the vicinity of the work, to be used as a boarding house for men employed on the work; built stables for their teams; hired men and teams; purchased a large amount of plant, consisting of shovels, plows, scrapers and the like, and generally equipped themselves in a proper manner to expeditiously perform the work, and commenced the work with men and teams about the 1st day of August, 1892.

"On the 6th day of August, 1892, without fault on their part and while the work was progressing, claimants were stopped by the United States and their contract abrogated against their consent, and the work that they had contracted to do readvertised, for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day, and the United States refused to permit claimants to continue the work either under the terms of the contract or under the terms of the law of August 1, 1892, but immediately, and against the protest of claimants, readvertised and let the said work to other parties.

"In the prosecution of said work under said contract, prior to the abrogation thereof on August 6, 1892, claimants expended the sum of $678.21, which has not been paid to them.

"By reason of the abrogation of said contract claimants lost the following sums expended and were deprived of the following profits which they would have made in the execution of said work:

Expenses incurred	$678 21
Profits if they had been permitted to perform	7.150 00"

Mr. Justice McKenna delivered the opinion of the Court.

We agree with counsel that the question in the case is a narrow one. It is not denied that the approval of the Chief of Engineers was necessary to the legal consummation of the contract. It is, however, insisted that the approval was not required to be formally expressed, but could and did consist of acts preceding the written instrument, though the latter contained the terms and covenants of the parties. In other words, it is contended that the advertisement, claimant's bid made under competition, which was submitted to the Chief of Engineers, who, after some correspondence with the engineer in Chicago in relation thereto, had in writing directed it to be accepted, the preparation of the formal contract on a blank furnished by the Chief of Engineers, its execution by both the officer in

charge and the claimants, in due form and in strict accordance with the provision of section 3744 of the Revised Statutes, constituted an approval.

We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights. And it was such written instrument that was to be approved by the Chief of Engineers. The approval was to be a future act. The provision of the contract was: "This contract" (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) "shall be subject to approval of the Chief of Engineers of the United States Army." The approval, therefore, did not consist of something precedent, but was to consist of something subsequent. That which preceded was inducement only, and contemplated an instrument of binding and remedial form, and hence to contain covenants imposing obligations and giving rights and remedies, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed, should be devolved on the Chief of Engineers, and it was not satisfied by prior instructions. In other words, a final reviewing and approving judgment was given to the Chief of Engineers, and was given by a covenant so expressed as to constitute a condition precedent to the taking effect of the contract. If the covenant did not mean that, it was idle. Construed as prospective, it had a natural purpose. The engagement of the parties did not end with the bid and its acceptance. The performance of the work was to be secured, and the final judgment of what was necessary for that, as we have already said, was to be given by the Chief of Engineers.

The case of *United States* v. *Speed*, (8 Wall. 78,) cited by appellant, is not apposite. In that case the facts were that the Secretary of War, through the Commissary General, "authorized Major Simonds, at Louisville, in October, 1864, and during the late rebellion, to buy hogs and enter into contracts for slaughtering and packing them to furnish pork for the army. On the 27th of October, Simonds, for the United States, and Speed, made a contract by which the live hogs, the cooperage, salt and other necessary materials, were to be delivered to Speed by the United States, and he was to do the work of slaughtering and packing. The contract was agreed to be subject to the approval of the Commissary General of Subsistence. No advertisements for bids or proposals were put out before making the contract, nor did the contract contain a provision that it should terminate at such times as the Commissary General of Subsistence should direct. After the contract was made, Simonds wrote—as the facts were found under the rules, by the Court of Claims, to be—to the Com-

missary General, informing him substantually of its terms; but no copy of it nor the contract itself was presented to the Commissary General for formal approval. The Commissary General thereupon wrote to Simonds, expressing his satisfaction at the progress made, and adding: 'The whole subject of porkpacking at Louisville is placed subject to your direction under the advice of Colonel Kilburn.'"

After reciting those facts this court said by Mr. Justice Miller: "We are of the opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did."

In *United States* v. *Speed*, therefore, the acts which were held to constitute an approval of the contract relied upon were subsequent to the contract, and referred to it. In the case at bar it is stated in the opinion of the Court of Claims that after the contract was signed it was mailed "to the Chief of Engineers in Washington for his approval," and that "it was immediately disapproved and returned to the officer (engineer in charge at Chicago) with instructions to readvertise the work."

The declaration, in the opinion of the Court of Claims, that the contract was disapproved, is asserted to be incorrect by claimants, and the findings are quoted to show that the contract was abrogated, not disapproved. That is undoubtedly the expression of the finding, but its meaning is manifest. An order to the officer in charge to abrogate the contract was certainly a very definite and unmistakable disapproval of it. At any rate, there was no approval of it, and that was a necessary condition to its final effect and obligation.

It is further urged that the terms of the contract were not disapproved, and that the action of the Chief of Engineers was "for the alleged reason that by the act of August 1, 1892, no work could be prosecuted by the United States without a stipulation in the contract binding the contractor not to permit his workmen to labor more than eight hours per day." It may be assumed that the Chief of Engineers considered that the contract took effect by his approval, and that if he approved it he would incur the penalties of the statute. But however that may be, the reasons for his action is not open to our inquiry. The contract was not approved, and how can the legal consequence of that be escaped? We could not have compelled the approval of the contract, and we cannot treat it as approved and adjudge rights as upon the performance of a condition which was not performed.

This case has some features of hardship. They are, however, explained and somewhat lessened by the facts stated in the opinion of the Court of Appeals. It is there stated:

"The contract bears date the 19th July, 1892. It provides in terms that the contractors 'shall commence work on or before the 1st day of August, 1892,' but it appears by evidence *aliunde* that the instrument was not mailed to the contractors for signature until the 20th July, 1892; that it was returned for corrections; that it was not finally mailed for signature until the 27th of July, 1892, and that it was not signed by the contractors until some day between the 27th of July and the 1st of August, 1892. On the faith of the agreement executed by the contracting officer, but without his knowledge or direction, the contractors proceeded to make ready for their work and, indeed, performed, to some extent, incurring thereby a loss of $678.21."

And further, that "the work was done without the knowledge or direction of the officer in charge, and no benefit resulted thereby to the defendants" (United States).

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.